

In the Matter of the ORS 656.245 Medical Services Dispute of

Sherrell, Karen, Claimant

Contested Case No: H04-037

PROPOSED AND FINAL ORDER OF DISMISSAL

August 2, 2004

SHELDON K. SAKS, MD, Petitioner

AMERICAN ASSURANCE COMPANY, Respondent

Before Ella D. Johnson, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

On March 4, 2004, this matter was referred the Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD) to the Office of Administrative Hearings (OAH) for a show cause hearing to determine whether Petitioner's request for hearing challenging the Medical Review Unit's (MRU's) Administrative Order was timely. In its referral, the department delegated to OAH "all agency functions, responsibilities and duties, except the preparation and issuance of a final order." On May 26, 2004, OAH Administrative Law Judge (ALJ) Ella D. Johnson conducted a show cause hearing by telephone in Salem, Oregon. Petitioner Shelton K. Saks, MD represented himself without benefit of counsel. Attorney at Law Roger Hepburn represented responding insurer, American Assurance Company and its service company, AIG Claim Services, Inc (insurer). Dr. Saks testified on his own behalf. The record closed following the hearing on May 26, 2004.

On May 28, 2004, I issued an Interim Order Setting Case for Hearing, which found that Dr. Saks' request for hearing challenging MRU's May 13, 2003 Administrative Order was timely because it was mailed to WCD within 30 days of the mailing date of MRU's order. The matter was heard at telephone hearing on July 29, 2004 with ALJ Johnson presiding. Dr. Saks represented himself pro se. Attorney at Law Jerald P. Keene represented the insurer. No witnesses testified. Insurer made a Motion to Dismiss for lack of jurisdiction based on Dr. Saks' lack of standing to appeal this dispute.

EVIDENTIARY RULING

The ALJ relies on the testimony and exhibits presented and admitted into the record at the May 26, 2004 show cause hearing.

ISSUE

Whether Dr. Saks' request for hearing should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

(1) On May 13, 2003, MRU issued an Administrative Order which concluded that insurer was not liable for payment of chiropractic services performed by Daniel Beeson, DO at Dr. Saks' request from September 25 through October 2, 2002, and from October 11 through November

20, 2002.

(2) Sometime before May 25, 2003, Dr. Saks requested his staff to contact MRU to obtain information on how to contest the May 13, 2003 order. Dr. Saks' staff was told by MRU to complete and submit a Request for Contested Case Hearing form and send it to WCD and to send a letter to insurer explaining the situation. (Test. of Dr. Saks.)

(3) Dr. Saks followed MRU's direction, completing the Request for Contested Case Hearings and signing the form on May 20, 2003. He also wrote a letter to MRU's Medical Reviewer Celeste Honse with a copy to insurer, which was inadvertently misdated as May 5, 2003, instead of May 25, 2003. The letter to MRU and the Request for Contested Case Hearing were sent in the same envelope addressed to Ms. Honse. (Exs. A, 23; test. of Dr. Saks.)

(4) On May 25, 2003, Dr. Saks mailed the envelope containing the letter to Ms. Honse and the completed Request for Contested Case Hearing form to WCD at its correct mailing address, 350 Winter Street SE, Room 27, certified mail with Return Receipt. The envelope containing the letter addressed to Ms. Honse and the completed Request for Contested Case Hearing form were received by WCD on May 29, 2003. (Ex. C.)

(5) On December 16, 2003, Dr. Saks sent a letter to WCD Administrator John Shiltz requesting the status of his appeal of MRU's Administrative Order. (Ex. 25.) On January 30, 2004, WCD Policy Section Manager Kevin Willingham notified Dr. Saks that such requests must be postmarked within 30 days of the date of the order and that his hearing request was not timely. (Ex. 26.)

CONCLUSION OF LAW

Dr. Saks' request for hearing should be dismissed for lack of jurisdiction

OPINION

The issue to be resolved is whether Dr. Saks' request for hearing should be dismissed for lack of jurisdiction. The burden of proof rests on the proponent of that fact or position. ORS 184.450(2). As the proponent of the Motion to Dismiss for lack of jurisdiction, insurer has the burden of proving that Dr. Saks' lacks standing to appeal MRU's order. The insurer's motion is granted.

Jurisdiction "exists when [the] court has cognizance of [the] class of cases involved, proper parties are present, and [the] point to be decided is within the powers of the court." *Blacks Law Dictionary*, 766 (5th ed 1979)

ORS 183.310(7) defines a party as:

- (a) Each person or agency entitled as of right to a hearing before the agency;
- (b) Each person or agency named by the agency to be a party; or

(c) Any person requesting to participate before the agency as a party or in a limited party status which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result. The agency's determination is subject to judicial review in the manner provided by ORS 183.482 after the agency has issued its final order in the proceedings.

A party has standing if, under the substantive law, it has a right to obtain an adjudication of its claims. *Estate of Hutchins v. Fargo*, 188 Or App 462 (2003).

ORS 656.248(12) provides:

(12) When a dispute exists between an injured worker, **insurer** or self-insured employer and **a medical service provider regarding either the amount of the fee or nonpayment of bills for compensable medical services**, notwithstanding any other provision of this chapter, the injured worker, insurer, self-insured employer or **medical service provider shall request administrative review by the director. The decision of the director is subject to review as provided in ORS chapter 183.**

(Emphasis added.)

Here, the dispute concerns the nonpayment of Dr. Beeson's bills, not the nonpayment of Dr. Saks' bills. Consequently, under ORS 656.248(12), Dr. Beeson is the medical provider with standing under the statute to request administrative review from the director of the department and to request a contested case hearing under ORS chapter 183 challenging any order issued by MRU on behalf of the director concerning the dispute.

Dr. Saks argues that he was told by MRU to file a request for hearing and he followed their direction. It is unfortunate that MRU incorrectly advised him, but MRU cannot create jurisdiction over this dispute by its incorrect advice to file a request for hearing. Consequently, I conclude that because the request for hearing was filed by Dr. Saks who is not the provider seeking to have his bills paid, I am without jurisdiction to hear Dr. Saks' appeal of MRU's order. Accordingly this matter is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this 2nd day of August 2004 in Salem, Oregon.